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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 290

M. EDWARD BUCKLEY, JR.,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

Brief of the Respondent District of Columbia in Opposition to Petition for Writ of Certiorari.

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CENTRAL DUPLICATING DIVISION—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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STATEMENT OF THE CASE

The facts are sufficiently stated in the petition and in the opinion of the United States Court of Appeals for the District of Columbia and will not be repeated.

SUMMARY OF ARGUMENT

1. Judge Newman was without authority to rehear the question of the sufficiency of the plea of former jeopardy previously passed upon by Judge Neilson. Both of these judges are judges of the Police Court of the District of Columbia. The District of Colum-

bia Code provides that the decision of one judge of that court on the court's business shall be the decision of the court. This is also the Federal rule. Judge Neilson, in a memorandum opinion, held that petitioner's conviction of the offense of driving on the wrong side of the street was not a bar to his prosecution for driving while under the influence of intoxicating liquor, and ordered that the case proceed to trial on its merits. Such a decision was the decision of the Police Court and was not subject to being reheard and overruled by Judge Newman.

2. Petitioner relies on the defense of double jeopardy, contending that his plea of guilty to an information charging him with a violation of that District of Columbia traffic regulation which requires drivers of motor vehicles to keep to the right of the center of the street, prevents the District of Columbia from instituting a prosecution against him for violating an Act of Congress prohibiting the operating of a motor vehicle while under the influence of intoxicating liquor. This Court has long recognized the rule that there must be an identity of offenses in order to raise the defense of double jeopardy. There is clearly no identify of offenses in this case. One could violate the regulation requiring that operators keep to the right of the center of the street without being guilty of operating a vehicle while under the influence of intoxicating liquor. Conversely one could be guilty of driving a vehicle while under the influence of intoxicating liquor without being guilty of violating the regulation requiring that operators keep to the right of the center of the street.

3. Petitioner relies further on estoppel, contending that, because the District of Columbia elected to prosecute him for the offense of driving on the wrong side of the street, it is estopped to prosecute him for the offense of driving while intoxicated. Such is clearly not the law. Petitioner's plea does not allege any agreement between him and an Assistant Corporation Counsel. Even if there were an agreement it would not be binding on the District of Columbia.

ARGUMENT

I

One Judge of the Police Court is without power to overrule the action of another Judge.

Judge Newman had no authority to permit petitioner to renew his plea in bar after said plea in bar had been disposed of by another judge of the Police Court. Section 44, D. C. Code, 1901, Section 11-601, Code of Laws of the District of Columbia (1940 Ed.) provides, in part, as follows:

> "* * * The judges shall have power to make rules for the apportionment of business between them and the act of each judge respecting the business of the court shall be deemed and taken to be the act of the court * * *".

Not only does the Code of the District of Columbia preclude the rehearing by another judge of such a matter as a plea in bar after another judge of the Police Court had finally determined that matter but also the uniform rule of the Federal Courts has for many years been the same in effect. The rule long recognized in Federal Courts is stated by the Circuit Court of Appeals for the Second Circuit in the case of *Commericial Union of America, Inc.* v. *Anglo-South American Bank, Ltd.*, 10 F. (2d) 937, as follows:

> "Judges of coordinate jurisdiction, sitting in the same Court and in the same case, should not overrule decisions of each other."

So carefully is this rule followed that the Court in the above case held that failure to follow this rule was sufficient grounds for reversal. Judge Rogers, speaking for the Court and con-

cluding the Court's opinion by referring to the rule heretofore quoted, said (p. 941):

> "For that reason and that reason only, the judgment is reversed, and the District Court is directed to reinstate the action and grant the motion to amend the complaint."

See also:

Jurgenson v. *National Oil & Supply Co.*, 63 F (2) 727.
Plattner Implement Co. v. *International Harvester Co.*, 133 F. 376.
Erie Transfer Co. v. *J. Cutler Iron Works*, 47 F. (2) 1074.
Wright v. *Barnard*, 264 F. 582.
Claflin Co. v. *Furtick*, 119 F. 429.
Taylor v. *Decatur Mineral & Land Co.*, 112 F. 449.
Shreve v. *Cheesman*, 69 F. 785.
Wakelee v. *Davis*, 44 F. 532, affirmed on other grounds, 156 U. S. 681.

Therefore, as Judge Newman had no authority to overrule the decision of Judge Neilson, the latter's decision must stand.

II

The Court of Appeals correctly held that Petitioner's prior conviction did not constitute former jeopardy.

The rule with respect to former jeopardy long recognized by this Court is to the effect that in order to invoke the defense of former jeopardy there must be an identity of the offenses in question. The question naturally arises as to whether or not the two offenses here involved, one set forth in Information No. 484,036, charging petitioner with operating a motor vehicle and failing to keep to the right of the center of the street, and the second set forth in Information No.

501,335, charging the petitioner with operating a motor vehicle while under the influence of intoxicating liquor, are identical. It is the position of the District of Columbia that in no sense are these offenses identical.

In *Burton* v. *United States,* 202 U. S. 344, the defense of double jeopardy was raised by the defendant by reason of the fact that in a previous trial of the case he had been acquitted of receiving money from one W. D. Mahaney, mentioned as an officer and employee of the Rialto Grain and Securities Company. In the subsequent indictment he was charged with having received such compensation from that corporation. This Court held that the two offenses were not identical, and that the acquittal under the indictment for the first was not a bar to a prosecution under the second indictment.

In the case of *Gavieres* v. *United States,* 220 U. S. 338, 31 Sup. Ct. 421, defendant there had been convicted under a Manila ordinance for behaving in a drunken and boisterous manner in a public place. This Court held that he was not twice put in jeopardy in a subsequent trial for outraging and insulting a public official by word of mouth in his presence, contrary to the provisions of the Philippine Islands Code. The two offenses grew out of the same transaction. Mr. Justice Day, speaking for this Court, said, page 341:

> "It is to be observed that the protection intended and specifically given is against second jeopardy for the *same offense.* The question, therefore, is, Are the offenses charged, and of which a conviction has been had in the municipal court and in the Court of First Instance, identical. An examination of the ordinance shows that the gist of the offense under it was behaving in an indecent manner in a public place, open to public view. It was not necessary to charge or prove under the municipal ordinance any outrage, insult or threat to a public official or agent of the authorities. The charge contained in the record shows that under the municipal ordinance the plaintiff in error was

charged with willfully and unlawfully, in a public street car and in the presence of numerous persons, including ladies, conducting himself in a reckless, indecent and discourteous manner.

"It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of opinion that while the transaction charged is the same in each case, the offenses are different. This was the view taken in *Morey* v. *Commonwealth,* 108 Massachusetts, 433, in which the Supreme Judicial Court of Massachusetts, speaking by Judge Gray, held:

" 'A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' "

As in *Morey* v. *Commonwealth,* 108 Mass. 433, it would be incumbent upon the prosecution in proving a case under Information 501,335, charging "Driving while under the influence of intoxicating liquor" to prove facts additional to and different from those necessary to support the simple charge presented in Information No. 484,036, charging this petitioner with driving an automobile and failing to keep to the right of the center of the street.

In the case of *Morgan* v. *Devine,* 237 U. S. 632, this Court held that the defendant, Devine, who had been convicted of breaking into a Post Office, and also committing larceny there-

in, and who had been convicted under separate counts of the same indictment and who had been sentenced to serve separately under each count was not entitled to be released on the ground of double jeopardy after having served his sentence under the first count. Defendant had claimed double jeopardy because the several acts charged were done at the same time and as part of one transaction. This Court said, page 639:

> "Notwithstanding there is a difference in the adjudicated cases upon this subject, we think the better doctrine recognizes that, although the transaction may be in a sense continuous, the offenses are separate, and each complete in itself. This is the result of the authorities as stated by Mr. Bishop in his new work on Criminal Law (Eighth Edition):
>
> " 'If in the night a man breaks and enters a dwelling house to steal therein, and steals, he may be punished for two offenses or one, at the election of the prosecuting power. An allegation simply of breaking, entering, and stealing states the burglary in a form which makes it single, and a conviction therefor will bar an indictment for the larceny or the burglary alone. But equally well a first count may set out a breaking and entering with intent to steal, and a second may allege the larceny as a separate thing, and thereon the defendant may be convicted and sentenced for both.' (Section 1062) . . . 'The test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second can not be maintained; when there could not, it can be.' (Section 1052, p. 630.)."

Applying the rule there approved by this Court to the instant case it can be demonstrated readily that the facts necessary to establish the charge of driving an automobile and failing to keep to the right of the center of the street would fall far short of establishing the charge of driving an automobile while under the influence of intoxicating liquor.

The United States Court of Appeals for the District of Columbia has consistently followed the rulings of this Court on the question of double jeopardy.

See:

Hopkins v. *United States,* 4 App. D. C. 430,
Nordlinger v. *United States,* 24 App. D. C. 406,
Monroe v. *United States,* 56 App. D. C. 80, 10 Fed. (2) 645,
Sims v. *Rives,* 66 App. D. C. 24, 84 Fed. (2) 871,
Berry v. *United States,* 72 App. D. C. 229, 113 Fed. (2) 183.

Some mention should be made of applicable State cases in which the defense of double jeopardy was raised concerning similar traffic offenses. In *State* v. *Garcia,* 198 Iowa 764, 200 N. W. 202, it was held that a conviction for intoxication is no bar to prosecution for driving an automobile while intoxicated. A conviction in the Municipal Court of the crime of driving an automobile while intoxicated is not a bar to prosecution for involuntary manslaughter. *People* v. *Townsend,* 214 Mich. 275, 16 A. L. R. 902. A conviction for reckless driving is no bar to a subsequent prosecution for driving an automobile while under the influence of intoxicating liquor, and a conviction for driving an automobile while under the influence of intoxicating liquor does not bar a prosecution for reckless driving. *State* v. *Sisneros,* 82 P. (2d) 274, 42 N. M. 500; *People* v. *McGrath,* 94 Cal. App. 520, 271 P. 549. In the case of *Woods* v. *State,* 15 Ala. App. 251, 73 So. 129, it was held that a conviction for reckless driving under a municipal ordinance was no bar to a charge of injurying property and leaving the place of injury without stopping.

Following the principle of these cases, it can readily be seen that the two offenses have no material relation to each other. One may drive on the wrong side of the street and be perfectly sober. Conversely one may be guilty of driving while under

the influence of intoxicating liquor while driving on the proper side of the street.

III

The District was not estopped to file a new information charging petitioner with driving while under the influence of intoxicating liquor.

Judge Newman of the Police Court, in granting petitioner's plea in bar raising the issue of double jeopardy, seemed to rely principally on the following proposition:

> "Bearing in mind the power of the prosecutor as heretofore discussed it would appear that in cases in which the prosecutor dismisses a higher charge and accepts a plea of guilty to a lesser one that the Court is in honor bound to carry out the implied (if not expressed) agreement between the Government and the defendant that the higher charge has been thereby finally disposed of."

A reading of petitioner's amended plea in bar attached to the bill of exceptions as Exhibit "A" fails to disclose any such agreement as Judge Newman indicates. The Court of Appeals held there was no such agreement, either express or implied. But even if the record did disclose such an agreement, the cases on the subject show conclusively that Judge Newman was not relying on the weight of authority in setting forth this proposition. See annotation in 85 A. L. R. 1177. The case of *West Virginia* v. *Ward*, 112 W. Va. 522, 165 S. E. 803, 85 A. L. R. 1175, is cited for the proposition that an agreement between a prosecuting attorney and an accused approved by the Court should be upheld ordinarily when the accused has fulfilled his part of the agreement. The annotation on this case says (p. 1177):

> "The reported case (State v. Ward, ante, 1175) is the only one found that has expressly enforced an agreement to accept a plea of guilty on one count and to give immunity by discharging other counts. The fact that the agreement was approved by the trial court is, of course, of vital importance.
>
> "It does not appear in any of the other cases which have been found, that the trial court had sanctioned the agreement in question."

In West Virginia the prosecuting officer cannot, contrary to the common law rule, enter a nolle prosequi except with the consent of the court. *Denham* v. *Robinson,* 72 W. Va. 243, 77 S. E. 970, 45 L. R. A. (N. S.) 45.

The only other case relied upon by petitioner is *People* v. *Johnson,* 372 Ill. 18, 22 N. E. (2) 683. That case involved the compromise of a tax claim in consideration of the abandonment of the criminal prosecution and comes within the classes of cases distinguished in the case of *Buie* v. *United States* (C. C. A. 5th) 76 Fed. (2) 848, certiorari denied 296 U. S. 585. There an indictment had been previously returned charging appellant, Buie, and five others with substantially the same offense charged in the case in which conviction was secured against him. A nolle prosse was entered in that case as to appellant, and two others, while the remaining three defendants entered pleas of guilty. The plea in bar alleged that appellant had entered into an agreement through his counsel with Mr. Woodcock, Special Assistant to the Attorney General, to the effect that if pleas of guilty were entered by the other defendants he would dismiss the indictment and terminate the prosecution as to the appellant and others. The Court said (p. 849):

> "It is elementary that an indictment may be dismissed and the defendant reindicted for the same offense, if he had not been put in jeopardy. Appellant cites a number of cases to the effect that the United

States is bound by an agreement entered into by her counsel in a civil case; other cases holding that where revenue claims have been compromised and paid criminal prosecutions are barred, and other cases holding that where witnesses have been compelled to give testimony against themselves before an investigating authority immunity results. It would be useless to review these cases, as none of them are in point, and we are not aware of any decision, either controlling or persuasive, that would support the contention of appellant. We have no hesitancy in holding that the government was not estopped to prosecute appellant in this case regardless of whether an agreement was made as alleged. The assignment is without merit."

In the case of *United States* v. *Ford*, 99 U. S. 593, the question involved was stated by this Court as follows (p. 598):

"Waiving, for the present, the question whether the district attorney may contract with an accomplice of an accused person on trial, that if he will testify in the case his taxes shall be abated, or that he and his property shall be exempt from internal revenue taxation, the court will consider in the first place whether the district attorney, as a public prosecutor, may properly enter into an agreement with such an accomplice, that if he will testify fully and fairly in such a prosecution against his associate in guilt he shall not be prosecuted for the same offense; and if so, whether such an agreement, if the witness performs on his part, will avail the witness as a defense to the criminal charge in case of a subsequent prosecution."

The lower Court had answered in the affirmative. After considering the matter at some length, this Court concluded as follows (p. 606):

"Having come to the conclusion that the district attorney had no authority to make the agreement

alleged in the plea in bar, it follows that the circuit court erred in the two cases instituted there, in overruling the demurrer to it, and that the judgment must be reversed, and the causes remainded for further proceedings in conformity with the opinion of the court."

To the same effect see:

Gladstone v. *United States,* 248 F. 117;
Cases cited in annotation in 85 A. L. R. 1177.

Petitioner contends that it is unfair and oppressive to permit more than one prosecution to grow out of the same transaction. In answer to this contention, the Court of Appeals said: (Op. pp. 5, 6).

"The opinion of Judge Newman urges that where the statutory definition of offenses is such that more than one may grow out of the same transaction, it is oppressive for the prosecution to file and prosecute several charges successively, that either all should be filed and disposed of at one time, or the prosecution limited to the first it selects and presses to conviction. But the definition of offenses is for the legislative authority, and the determination of whether and when to prosecute for more than one growing out of the same transaction is a matter of policy for the prosecuting officer and not for the determination of the courts. Moreover, while under some circumstances it might be unfair to prosecute for more than one offense, under others the danger to the public from the conduct of an offender might be such as well to warrant his prosecution for all offenses committed. There is an insufficient disclosure of the circumstances of the instant case to warrant any conclusion, even if we had authority to reach one, as to whether the action of the Corporation Counsel's office in the instant case was fair or not fair."

CONCLUSION

For the reasons hereinbefore stated it is respectfully submitted that the petition for writ of certiorari should be denied.

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